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NORTHERN DISTRICT OF CALIFORNIA

Attorney for Third Party Respondent
EXP PHARMACEUTICAL SERVICES CORP.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PHARMACEUTICAL INVENTORIES,
INC. d/b/a PHARMACEUTICAL
RETURNS SERVICE,

Plaintiff,

vs.

MICHAEL ZACCARO and RETURNS R.
US, INC. d/b/a/ PHARMA LOGISTICS,
LTD.,

Defendants.

Case No. CV-07-80231-MSC SBA

**DECLARATION OF GUS
CHANGARIS IN SUPPORT OF
OPPOSITION OF EXP
PHARMACEUTICAL SERVICES
CORP. TO MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Date: November 6, 2007

Time: 1:00 p.m.

Courtroom: 3, 3rd Floor

Judge: Hon. Sandra Brown Armstrong

I, Gus Changaris, declare as follows:

1. At all times herein mentioned I have served as the Chief Executive Officer of EXP PHARMACEUTICAL SERVICES, CORP. ("EXP"), a California corporation with its principal place of business in the City of Fremont, County of Alameda, California. I am competent to testify as to the matters set forth herein.

1 2. I am in receipt of the Subpoena issued by Defendants Michael Zaccaro (hereinafter
2 "Zaccaro") and Returns R Us Incorporated d/b/a Pharma Logistics Ltd (hereinafter "Pharma
3 Logistics"), collectively referred to as "Defendants." This Subpoena demands the production of
4 records of EXP. EXP objects to the production of records, except those already produced, requested
5 in the Subpoena. This Court should be aware of the following facts:
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7 a. EXP is not a party to the above-entitled proceeding between Pharmaceutical
8 Returns (hereinafter "Plaintiff") and Defendants which gave rise to the Subpoena. EXP is not
9 involved in any of the claims or defenses in this action. EXP is not connected in any way to either
10 Plaintiff or Defendants, except as a competitor, and is unaware as to why the information is
11 requested from EXP.
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13 b. EXP does not have, has not used, has not inspected, and has no knowledge
14 of the "source code" which is the subject of the primary litigation. (See Declaration of John D.
15 Minton, filed October 1, 2007, Exhibit B,).
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17 c. In fact, EXP has expended millions of dollars over the past fourteen years in
18 the creation, implementation, revision, and adaptation of its own source code and software designed
19 to operate the EXP internal product and service management programs employed at EXP.

20 d. EXP is a direct competitor of Plaintiff and Defendants.

21 e. I am informed and believe, based upon information received from others,
22 that Defendants have served subpoenas, similar to the Subpoena issued to EXP, to just about every
23 major entity and person working in the business of reverse distribution of pharmaceutical products.
24 A list of these subpoena recipients is set forth in the Certification of Interested Persons or Entities
25 filed herewith.
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1 3. This declaration is submitted in support of EXP's opposition to the Motion to
2 Compel filed by Defendants. The opposition is based upon the fact that production of the
3 documents requested would impose an undue burden on EXP and would require the disclosure of
4 trade secrets, proprietary and other confidential information of EXP. Further, I am informed and
5 believe that Defendants may obtain the information they seek from other sources that are more
6 convenient, less burdensome or less expensive to EXP. The burden or expense imposed on EXP in
7 producing the requested documents outweighs any potential benefit to Defendants.
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9 4. EXP is in the business of reverse distribution of pharmaceutical products. This is a
10 highly competitive industry, with several firms, such as EXP, and Plaintiff and Defendants herein,
11 conducting operations on a national and international basis. For any one company to have access to
12 the information and software of a competitor, such as the information demanded by Defendants
13 from EXP, would provide an advantage to the receiving company, and would result in catastrophic
14 losses to EXP.
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16 5. The reverse distribution of pharmaceutical products involves providing a service to a
17 pharmaceutical customer in the form of returning unused pharmaceutical products for credit, or for
18 destruction. The industry is characterized by its highly competitive nature. The list of potential
19 customers in the United States is finite. Therefore, a customer gained by one distributor is a loss for
20 another distributor. Driven by aggressive competition, margins on each return transaction are
21 maintained at razor-thin levels. The success of a company in this industry is built upon a high
22 volume of transactions, and its own internal efficiencies in managing its service, and maintaining
23 customer satisfaction.
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25 6. A further feature of the industry is that it is closely regulated by numerous state and
26 federal agencies. These agencies mandate specific handling and reporting protocols for the
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1 distribution and reverse distribution of pharmaceutical products. Reporting requirements are strictly
2 enforced and penalties for failure to comply are imposed. In order to protect itself, and its
3 customers, EXP and its competitors, must scrupulously account for, and provide reports for each
4 and every pharmaceutical return transaction. For EXP, the internally created software and computer
5 controls allow us to monitor millions of pharmaceutical return transactions.
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7 7. Aside from processing a high volume of return transactions, EXP must look to
8 cutting-edge cost control measures in order to remain competitive, remain profitable, and maximize
9 the returns provided to their customers. One such efficiency measure employed by EXP was to
10 internally develop software that efficiently tracks the return of pharmaceutical products, complies
11 with regulations imposed by the federal government, and all 50 states, not to mention local
12 jurisdictions, and provides reports to customers. This software, used by certain employees of EXP,
13 features a series of hundreds of screen images. These images, which are unique to the EXP
14 software, disclose, inter alia, methods of data entry, data processing, transactional histories,
15 reporting requirements, and customer requirements, in addition to the design of the screen image
16 itself. The viewing of even a single screen image will reveal confidential and trade secret
17 information about the software. In fact, the screen image is a representation of the software, and
18 the source code that produces it. A viewing of the screen is tantamount to a direct review of the
19 source code. Defendants' suggestion that an examination of a Screen Print leaves the source code
20 protected is, in fact, untrue.
21

22 8. Since its founding in 1994, EXP has spent several million dollars, and countless
23 hours of employee time, in the development of its internal software. My own estimate would be
24 that over \$8,000,000.00 of EXP funds have been invested in software design, development and
25 adaptation since 1994, and that in excess of 100,000 worker-hours of labor have been devoted to the
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1 development of the software during the same period. This represents a massive investment for a
2 company the size of EXP, but we consider that the result, a unique software program designed to
3 efficiently support the reverse distribution business, to be worth the effort. This software was
4 developed internally by EXP, from scratch and without reference to software of any other
5 competitor. It has been refined and revised continuously by EXP over the past fourteen years. It is
6 proprietary to EXP and a trade secret of EXP. This software is, in fact, the "crown jewels" of EXP
7 (the gratuitous argument to the contrary in the moving papers, notwithstanding). It is this software,
8 or the Screen Prints derived from this software, that Defendants would now like to review. Aside
9 from the initial and ongoing investment to produce the software, EXP has in place extensive
10 procedures and protections to protect the software from disclosure to those beyond the walls of
11 EXP, and most especially competitors. Third parties are not allowed access to this software, or
12 Screen Prints. The number of EXP employees with knowledge of the software, or even a part of it,
13 is limited. All designers and others are required to execute strict confidentiality agreements before
14 access is permitted. Persons outside of EXP are not permitted to obtain or retain copies of the
15 software, or Screen Prints.

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19 9. According to the moving papers, Defendants are accused of gaining "unauthorized
20 access" to Plaintiff's source code, and copying it. Thereafter, Defendants are accused of using the
21 software in their own business enterprise. (See Declaration of John D. Minton, Exhibit B,
22 Paragraph 11 of the Complaint). Based upon this premise (about which EXP has no information
23 whatsoever), Defendants have issued a Subpeona which sought the following items from EXP, for
24 the 14-year period of 1994 to the present:

25
26 "1. Training or user manuals for any pharmaceutical returns software owned or
27 licensed by EXP.

1 2. Documents sufficient to show the overall design of any pharmaceutical of
2 any pharmaceutical returns software owned or licensed by EXP.

3 3. Documents sufficient to show representative computer screen layouts for any
4 pharmaceutical returns software owned or licensed by EXP.

5 4. Representative sample reports generated by any pharmaceutical returns
6 software owned or licensed by EXP.”

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8 (See Declaration of John D. Minton, Exhibit A, Exhibit A to Supoena Duces Tecum, Instructions
9 and Definitions, pages 2 and 3).

10 10. By way of justification, Matthew C. Walch, Esq., attorney for Defendants, in his
11 cover letter of July 13, 2007, states “The requested information regarding the software program(s)
12 used by EXP will help prove to PRS (plaintiff, Pharmaceutical Inventories, Inc.) and its counsel that
13 software within this industry has to incorporate certain fields, commands and functionality to serve
14 the needs of the customer in this industry and that such fields, commands and functionality are not
15 and cannot be owned by any one business in this industry.” (See Declaration of John D. Minton,
16 Exhibit A).

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19 11. My responses to these assertions are,

20 a. I cannot believe that EXP software, or Screen Prints, produced internally at
21 EXP, can have any bearing on whether Defendants wrongfully accessed, copied, or used software
22 developed by Plaintiff.

23 b. The fact that Defendants seek Screen Prints created and/or used by EXP
24 establishes that the Subpoena is unduly burdensome, overbroad, and vague. These Screen Prints,
25 which are used internally at EXP, will disclose the nature and function of the software that created
26 it. Methods of data entry, routing of information, directions to operators to forward data or create
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1 reports, among other things, as well as the source code which creates these functions, will all be
2 revealed by reference to the Screen Prints which are sought by Defendants.

3 c. There is no mandate that a company in the pharmaceutical return industry
4 include "certain fields, commands and functionality" in its software. The inclusion of functions, or
5 ordering of functions, are elections made by each company. These decisions are informed by the
6 needs of customers, requirements of governing bodies, and the intuition, and knowledge of the
7 industry, each company brings to the software design process. It is quite likely that many functions
8 will be included in software of most reverse pharmaceutical distributions companies. However, it is
9 the presentation of these functions, the ordering of the functions, the entering of data, among other
10 factors, that makes software used by each company unique from its competitors.

11 d. Much of the information requested, from EXP and others, in the form of
12 sample forms and computer generated reports can be obtained by Defendants from other sources.
13 EXP has produced several sample reports to Defendants. These reports, and similar reports from
14 competitors are widely available, both in form and content, from prospective and existing
15 customers, from manufacturers, and on various websites. I am informed that Defendants may have
16 had several EXP reports, in hand, before the Subpoenas were ever issued. The fact is that many
17 reports are available, without resort to this Subpoena. Further, I am advised that Defendants have
18 received reports, and possibly including Screen Prints, from several subpoena recipients in the
19 reverse distribution industry. These reports reveal data and information that appears on the
20 computer screen or screens that generated the reports.

21 12. The material sought by Defendants, while unrelated to the issue in the primary
22 action, has tremendous competitive value to EXP. In fact, the software developed by EXP, and
23 which will be disclosed if Screen Prints are revealed, now sought by Defendants, makes it unique
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1 within the industry, and provides EXP with its true competitive advantage. The acquisition of this
2 software, or information about this software, by a competitor, would offer a tremendous competitive
3 advantage, and would result in insurmountable losses to EXP.
4

5 13. In order to control its business expenses EXP maintains administrative staff at
6 minimum levels. It is not untypical that each member of the administrative team performs
7 numerous functions, and works long hours. When the Subpoena was first received it was
8 determined that the production of the items requested involved over 8,000 pages of printed material,
9 200,000 lines of code, and several hundred internal and customer reports. Even though the request
10 has been narrowed, administrative resources of EXP will be expended to respond. I believe it is an
11 abuse of the judicial process to permit warring competitors to gain access to the confidential
12 information of EXP, and to burden the operations of EXP to produce the material. In both
13 instances, and through no fault of its own, in responding to the Subpoena, EXP is rendered less
14 competitive in the industry.
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16 14. EXP has previously provided Defendants with information in compliance with the
17 Subpoena. Customer reports, provided to EXP customers, and prospective customers, have been
18 produced (See Declaration of Paul I. Myers III, in support of this Response). In response to this
19 production, Defendants substantially reduced their request to include several screen images from
20 computers operating the EXP software. (See Myers Declaration, Exhibit F). The production of
21 these screen images will provide Defendants with an insight into the EXP software that is intrusive,
22 a violation of proprietary information of EXP, and runs the risk of compromising the software.
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25 15. EXP is aware of the "Restricting Order" (See Declaration of John D. Minton,
26 Exhibit D). EXP believes that this Restricting Order does not adequately protect EXP, for the
27 following reasons:
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1 a. I am advised that this Court, ruling on this Motion, has no enforcement
2 power over the Restricting Order.


3 b. If the Restricting Order is breached, EXP would have to travel to Illinois to
4 protect its interests. This would involve additional expense to EXP. EXP does not have counsel in
5 Illinois.
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7 c. Although EXP may be permitted to designate documents as "Highly
8 Confidential Information" the parties may be able to challenge that designation, and view the
9 documents. This would result in irreparable harm to EXP.
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11 d. Defendants admit that their use of produced material extends to offering
12 such material as evidence at trial. The Restricting Order does not preclude disclosure of protected
13 information at the time of trial.

14 16. Based upon the foregoing, I respectfully request that the Motion to Compel brought
15 by Defendants, be denied. The value of the information to Defendants is minimal, and the potential
16 damage to EXP is very real and potentially catastrophic.
17

18 I declare under penalty of perjury under the laws of the State of California that the foregoing
19 is true and correct and this declaration was executed on October 15, 2007, at Fremont, California.
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23 GUS CHANGARIS
24 Chief Executive Officer
25 EXP Pharmaceutical Services Corp.
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